IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.246 OF 1994

Shridhar Sakharam Omle,
Veer Sambhaji Chawl,
Lokhande Marg, Chember,
Bombay-400 074. .. Petitioner

v/s.

Yeshwantrao Chawan Academy of
Development Administration,
Raj Bhavan Complex, Baner Road,
Pune 411 007. ..Respondent

Mr.S.S.Deshmukh with Mr.N.M.Ganguli for the petitioner.

Mr.N.P.Deshpande for the respondent.

CORAM : R.M.LODHA &
S.J.VAZIFDAR, JJ.

DATED : 18TH JULY, 2006.

ORAL JUDGMENT (Per R.M.Lodha, J.)

By the order dated 14.10.1992, the petitioner who was working as General Assistant, Yashwantrao Chavan Academy of Development Administration (for short, “Yashada”) was dismissed from service with effect from 15.10.1992. The appeal preferred by the petitioner to the Chairman, Executive Committee, Yashada also came to be dismissed on 21.8.1993. The petitioner seeks to challenge these

orders in this writ petition.

2. The petitioner was appointed as Assistant in Yashada on 16.5.1986. He was provided with the room for his residence at the pump house in the compound of Yashada. The job of the petitioner was to oversee the mazdoors working in the Mali Department. In the night of 15.4.1992, one lady Smt.Hirabai (working as dish washer and chappati maker in the Mess) was found sleeping in the petitioner's room. The petitioner was served with chargesheet on 11.5.1992 under rule 22.01 of Yashada Service Rules, 1999. The charge against the petitioner was that he misbehaved in the room given to him by Yashada in its compound which in the eyes of the institution brought bad name. The imputation was that Smt.Hirabai was found sleeping in the room of the petitioner and that brought bad name, according to the institution.

3. Shri S.N.Khopde, Associate Professor was appointed as an Enquiry Officer to enquire into the charge levelled against the petitioner.

4. The petitioner responded to the charges by filing reply before the Enquiry Officer. He admitted that Smt.Hirabai came to his room in the night of 15.4.1992 and slept there but explained the circumstances in which she slept in his room. He stated that Smt.Hirabai resided at Vakhad and she had to go to Nashik but as she did not get any conveyance, she came to the room of the petitioner and slept there as

she was to get up early in the morning to go to to Nashik. According to the petitioner, the relationship between him and Smt.Hirabai was that of brother and sister.

5. Yashada examined Shri M.M.Shaikh and Shri Janardan Gangaram Karwade to prove the charges against the petitioner. Before the Enquiry Officer, the report of Shri D.S.Ganje given on 16.4.1992 and his statement dated 18.4.1992 were filed. The statement of one employee Shri P.E.Edge recorded during the preliminary enquiry was also filed.

6. The petitioner examined Shri Shankar Rambhau Suryavanshi, watchman, Patel India Company Limited in support of his defence.

7. The Enquiry Officer held that the evidence produced before him proved the allegations made against the petitioner. In his opinion, the petitioner needed to be punished as per regulation 22.02 (a) of the Yashada Service Rules.

8. The Disciplinary Authority forwarded the copy of the enquiry report to the petitioner with the notice dated 25th September, 1992, calling upon the petitioner to have his say.

9. The petitioner sent his reply to the notice on 29th September, 1992.

10. The Disciplinary Authority thereafter considered the matter and held that the charges levelled against the petitioner were proved and that he be dismissed from service with effect from 15.10.1992 in terms of regulation 22.02(b). The order of dismissal came to be issued on 14.10.1992

11. The petitioner preferred appeal against the order of dismissal dated 14.10.1992 before the Chairman, Executive Committee under regulation 22.04 and, as noticed above, the said appeal came to be dismissed on 21.8.1993.

12. We heard the counsel for the parties at quite some length. The counsel for the respondent conceded that Yashada is `State' or `instrumentality of State' within the meaning of Article 12 of the Constitution of India.

13. In the light of the arguments advanced by the counsel for the parties, the two issues arise for our consideration viz., (i) Is the finding of the Enquiry Officer or for that matter of the Disciplinary Authority that misconduct is proved is based on no evidence and (ii) if the answer is Yes, what relief may be granted to the petitioner.

Re : issue (i)

14. The counsel for the parties were ad idem that the

disciplinary proceedings against the petitioner were initiated for the misconduct under regulation 21.06 of the Yashada Service Rules which provide that every employee shall at all times maintain absolute integrity, devotion to duty and will do nothing which will embarrass Yashada.

15. To obviate any room of controversy with regard to the exact nature of charge, we reproduce Schedule-I and Schedule-II appended to the chargesheet as it is:

> Schedule – I
>
> You have misbehaved in the room given to you by Yashada in its compound.
>
> This is in the eyes of the Institution bringing bad name. This is the charge against Shri S.S.Omle, General Asstt.Pune-7.
>
> Schedule – II
>
> Shri S.S.Omle, General Asst. was found sleeping in the room at the Pump-House in the compound of institution at 2 hours on 15.4.1992 with Smt.Hirabai Sukhdev Panchras resident of Vakhad, Taluka Mulshi, District Pune. This being is bringing bad name according to the institution. This charge being made against Shri Omle.

16. That Smt.Hirabai was found sleeping in the room at the pump house allotted to the petitioner in the compound of Yashada at

02.00 hours in the midnight on 15.4.1992 is not in dispute. Rather this was admitted by the petitioner in response to the charge before the Enquiry Officer. The petitioner was also sleeping in his room. The question is whether this act can be said to have brought bad name to Yashada and amounts to misconduct under Regulation 21.06. Having read the entire material and the evidence produced before the Enquiry Officer, we find that there is absolutely no evidence worth the name to prove that the act of Smt.Hirabai sleeping in the petitioner's room was an embarassment to Yashada or brought bad name. Shri M.M.Shaikh, the Hostel Manager who was informed of this incident and who visited the petitioner's room at 02.00 O'Clock in the night of 15.4.1992 except proving the factum of Smt.Hirabai sleeping in the petitioner's room, has not said anything that the said act has embarrassed the institution or brought bad name or likely to bring bad name of the institution. He does not say that the petitioner and Smt.Hirabai were sleeping in the same room in any objectionable manner. He even did not ask Smt. Hirabai to leave the room as after his visit, Smt.Hirabai continued to sleep in that room. There is no allegation of adultery against the petitioner. The submission of the advocate for Yashada relying upon the judgment of Allahabad High Court in the case of Cyril Rowland Gibbs v. Mrs.Ellen Mabel Gibbs and another, AIR 1933 Allahabad 427 that when a man and woman were found together, it cannot be presumed that they are saying their prayers is not meritorious. That the petitioner and Smt.Hirabai were sleeping in suspicious circumstances is not even charge. Though Shri D.S.Ganje has not been examined by Yashada before the Enquiry Officer, his report and

statement were placed before the Enquiry Officer. He was the person who informed Shri M.M.Shaikh that Smt.Hirabai was sleeping in the petitioner's room. In his statement recorded during preliminary enquiry he stated that when he and Mahadgut were taking rounds in the hostel area, the petitioner and Smt.Hirabai came through the gate and went into the petitioner's room. Then he and Mahadgut both went into the room and saw that both of them were sleeping in the room. This would show that door of the room was open. The material even does not suggest that the petitioner and Smt.Hirabai were sleeping in their room in suspicious circumstances. The petitioner may have been guilty of the impropriety in permitting a woman to stay in his room in the night without seeking permission of the hostel manager but, surely, that would not constitute misconduct as contemplated under regulation 21.06. The charge has to be proved by evidence and cannot be held to be proved on presumptions. Despite limited jurisdiction, writ court is entitled to interfere in a case where the finding of the Enquiry Officer or for that matter that of Disciplinary Authority is based on no evidence. In the case of Narendra Mohan Arya v. United India Insurance Co.Ltd. and others, AIR 2006 SC 1748, the Apex Court enumerated the circumstances which need to be kept in mind by the court while dealing with the disciplinary enquiry. In paragraph 26 of the report, the Supreme Court observed thus-

> “26. In our opinion the learned Single Judge and consequently the Division Bench of the High Court did not pose unto themselves the correct question. The matter can be viewed from two

angles. Despite limited jurisdiction a civil court, it was entitled to interfere in a case where the report of the Enquiry Officer is based on no evidence. In a suit filed by a delinquent employee in a civil court as also a writ court, in the event the findings arrived at in the departmental proceedings are questioned before it should keep in mind the following: (1) the enquiry officer is not permitted to collect any material from outside sources during the conduct of the enquiry. [See State of Assam & Anr. v. Mahendra Kumar Das & Ors. [(1970) 1 SCC 807 : AIR 1970 SC 1255] (2) In a domestic enquiry fairness in the procedure is a part of the principles of natural justice [See Khem Chand v. Union of India & Ors., AIR 1958 SC 300 and State of Uttar Pradesh v. Om Prakash Gupta, (1969) 3 SCC 775] (3) Exercise of discretionary power involve two elements – (i) Objective and (ii) subjective and existence of the exercise of an objective element is a condition precedent for exercise of the subjective element. [See K.L.Tripathi v. State Bank of India & Ors. [(1984)] SCC 43 : AIR 1984 SC 273] (4) It is not possible to lay down any rigid rules of the principles of natural justice which depends on the facts and circumstances of each case but the concept of fair play in action is the basis. [See Sawai Singh v. State of Rajasthan [AIR 1986 SC 995] (5) The enquiry officer is not permitted to travel beyond the charges and any punishment imposed on the basis of a finding which was not the subject matter of the charges is wholly illegal. [See Director (Inspection & Quality Control) Export Inspection Council of India & Ors. v. Kalyan Kumar Mitra & Ors. [1987(2) CLJ 344] (6) Suspicion or presumption cannot take the place of proof even in a domestic enquiry. The writ court is entitled to interfere with the findings of the fact of any tribunal or authority in certain circumstances. [See Central Bank of India Ltd. v. Prakash Chand Jain, AIR 1969 SC 983, Kuldeep Singh v. Commissioner

of Police and others, (1999)2 SCC 10].”

17. In the present case, though the Enquiry Officer has held that on the basis of the evidence produced before him, the allegations made against the petitioner were proved, we find that there is no evidence worth the name to prove that the act of the petitioner had got the bad name. The findings recorded by the Enquiry Officer that “.....this was discussed by the employees of the institution teaching staff, security staff and other officers in the hostel of the institution.....” and “It is also clear that these discussions have gone outside the compound of the institution. The institution had got the bad name.” are based on no evidence. Neither Shri M.M.Shaikh nor the other witness Shri Janardan Gangaram Karwade has stated anything in this regard nor is there any other material even remotely suggesting this.

18. In the order of dismissal, the Disciplinary Authority also does not refer to any evidence which establishes that the act of the petitioner brought bad name to Yashada.

19. Though the Enquiry Officer in the report has referred to the written defence of the petitioner that the petitioner told Shri M.M.Shaikh that both of them (petitioner and Hirabai) treat each other as sister and brother and similarly, when the hostel warden took the statement of Hirabai, she also stated that their relationship is of brother and sister

and that was the reason she went to the room of the petitioner, there is no specific finding of the Enquiry Officer, accepting or rejecting the petitioner's explanation.

20. What is provided in regulation 21.06 is that the employee shall at all times maintain absolute integrity, devotion to duty and shall do nothing which will embarrass Yashada. To establish that the act of Hirabai sleeping in the petitioner's room amounted to misconduct under regulation 21.06, Yashada was required to prove that such act embarassed Yashada or was likely to embarrass Yashada. The charge was that Smt.Hirabai was found sleeping in the petitioner's room at 02.00 hours on 15.4.1992 and that in the eyes of the institution this act has brought bad name. There is neither direct nor circumstantial evidence to prove this charge.

21. We have, thus, no hesitation in holding that the finding of the Enquiry Officer that the charge against the petitioner is proved is based on no evidence. Rather, the said finding appears to be founded on presumptions and conjectures. Obviously, the order of dismissal based on such finding cannot be sustained.

22. We, therefore, hold that the order of dismissal is bad in law.

Re : issue (ii)

23. The question now arises what relief may be granted to the

petitioner. Few relevant facts in this connection may be noticed. The petitioner was employed in Yashada as Assistant on 16.5.1986. The incident occurred on 15.4.1992. He was dismissed from service with effect from 15.10.1992. At the time of incident, the age of the petitioner was about 49 years as is reflected from the enquiry report. The petitioner had put in about 6 years service with Yashada. He has already attained the age of superannuation. Yashada is not the commercial venture but a management institution for development of economic and social activities of the State Government, Zilla Parishads and other institutions and organisations of the State Government. It receives financial aid from the State Government and from donations. Having already reached the age of superannuation, the question of reinstatement does not arise. In the case of U. P. State Brassware Corpn. Ltd. & anr. v. Udai Narain Pandey, AIR 2006 SC 586, the Supreme Court surveyed large number of its decisions interalia M/s.Hindustan Tin Works Pvt.Ltd. v. The Employees of M/s.Hindustan Tin Works Pvt.Ltd., AIR 1979 SC 75; The Management of Panitola Tea Estate v. The Workmen, AIR 1971 SC 2171; Surendra Kumar Verma etc. v. The Central Government Industrial Tribunal-cum-Labour Court, New Delhi, AIR 1981 SC 422; The Managing Director, U.P. Warehousing Corporation and others v. Vijay Narayan Vajpayee, AIR 1980 SC, 840; The Life Insurance Corporation of India v. D.J. Bhadur and others, AIR 1980 SC 2181; Hindustan Motors v. Tapan Kumar Bhattacharya and another, (2002)6 SCC 41; U.P. State Textile Corpn.Ltd. v. P.C.Chaturvedi and others, (2005) 8 SCC 211; Allahabad Jal Sansthan v. Daya Shankar Rai and another, (2005) 5 SCC 124;

General Manager, Haryana Roadways v. Rudhan Singh, (2005) 5 SCC 591; A.P.State Road Transport Corporation and others v. Abdul Kareem, (2005) 6 SCC 36; M.L.Binjolkar v. State of M.P., (2005) 6 SCC 224; Rajasthan State Road Transport Corporation and others v. Shyam Bihari Lal Gupta, (2005) 7 SCC 406 and Kendriya Vidyalaya Sangathan and another v. S.C. Sharma, 2005 AIR SCW 377 and held that no precise formula can be laid down as to under what circumstances payment of entire back wages should be allowed as it depends upon the facts and circumstances of each case but it would, however, not be correct to contend that it is automatic. It should not be granted mechanically only because on technical grounds or otherwise an order of termination is found to be in contravention of the provisions of law. We reproduce the relevant few paragraphs of the said judgment that highlights the aforesaid legal position:

> "17. Before adverting to the decisions relied upon by the learned counsel for the parties, we may observe that although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result but now, with the passage of time, a pragmatic view of the matter is being taken by the court realizing that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched.

.....

58. A Division Bench of this Court in M.L.Binjolkar vs. State of Madhya Pradesh [JT 2005 (6) SC 461 : (2005) 6 SCC 224], referring to a large number of decisions, held:

> "7. ..... The earlier view was that whenever there is interference with the order of termination or retirement, full back-wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view..."

.....

63. It is not in dispute that the Respondent did not arise any plea in his written statement that he was not gainfully employed during the said period. It is now well-settled by various decisions of this Court that although earlier this Court insisted that it was for the employer to raise the aforementioned plea but having regard to the provisions of Section 106 of the Indian Evidence Act or the provisions analogous thereto, such a plea should be raised by the workman."

24. Applying the aforesaid legal position to the facts of the present case, it would be seen that the petitioner was Class-III employee in the institution having about six years service. Though there is no material placed before us by either of the parties about the gainful employment of the petitioner or otherwise during the last fourteen years but it can safely be presumed that the petitioner did not

remain idle for all these years. He would have been gainfully employed ordinarily if not for the entire period, at least for some period considering the fact that he was getting monthly salary of Rs.2000/- only from Yashada while he was in service, he needed some job for his survival. As a matter of law, the employee has to show that he was not gainfully employed. The initial burden is on him.

25. In the case of Chief Conservator of Forests and another v. Rahmat Ullah, (2003) 10 SCC 92, with regard to the workman who was engaged as Mali and whose services were found to have been wrongly terminated, dealing with the question of back wages, the Apex Court observed thus-

> "3. The respondent was out of service since 1990. As he was an ordinary worker, he must have been working elsewhere to earn his livelihood. There is no material to show that he was not gainfully employed. Accordingly, we order that the appellant Department to pay 50% of the back wages."

26. Besides that, it cannot be overlooked that though the misconduct under regulation 21.06 has not been proved but surely there was impropriety on the part of the petitioner in permitting a woman to stay in his room in the night without the permission of the hostel manager.

27. Thus, looking to the petitioner's conduct; that he had about

six years of service with Yashad; that ordinarily he would have been gainfully employed elsewhere during this period (there is no averment by the petitioner that he was not gainfully employed though the writ petition was filed almost after one and half years of the date of his dismissal) and that Yashada is not a commercial organisation, we are of the view that the petitioner may be awarded lumpsum amount of Rs.1,00,000/- as compensation for his wrongful dismissal. The amount of Rs.1,00,000/- includes the compensation in lieu of back wages and the retiral benefits. In other words, upon payment of Rs.1,00,000/- by Yashada to the petitioner, he shall not be entitled to any retiral benefits like pension, gratuity etc. The amount of compensation shall be paid by Yashada to the petitioner within one month from today, failing which it shall be liable to pay interest at the rate of 6% per annum on the said sum from the date of dismissal until the payment is made.

Rule is made absolute in the aforesaid terms. No costs.

(R.M.LODHA, J.)

(S.J.VAZIFDAR, J.)